

## Second-guessed and overturned

**Publication date:** 7/15/2012 **Page:** **Section:** Local News**Edition:** Sunrise

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SUMMARY: Portland police have no luck punishing officers if it gets to arbitration, but union challenges are few

In the past three decades, Portland police chiefs have fired officers who were convicted of driving drunk off duty, leaving dead animals outside a black-owned business, and selling "Smoke 'Em, Don't Choke 'Em" T-shirts to officers after a man died in police custody from a neck hold.

The chiefs had to bring them all back.

More recently, an arbitrator overturned the firing of Officer Ron Frashour for fatally shooting an unarmed man in the back; the 80-hour suspensions for Officer Chris Humphreys and Sgt. Kyle Nice following the death of James P. Chasse Jr.; and the 900-hour suspension of Officer Scott McCollister for his actions leading up to his fatal shooting of Kendra James.

So just what does it take to discipline a Portland police officer?

Frankly, if push comes to shove and it goes to arbitration, you can't do it.

Police leaders complain they can't effectively manage their workforce when decisions are second-guessed and overturned.

Police union representatives say the percentage of discipline cases they challenge is small. And they're right. In the past 10 years, 12 discipline cases in the nearly 1,000-member police force ended up in arbitration. An arbitrator overturned the discipline in half; the others await a hearing or a ruling. But the cases that reach arbitration usually are high profile and involve the most egregious conduct, tactics leading to the use of deadly force or, in Frashour's case, the use of such force. They tend to be those that reflect most poorly on the agency and anger the public, which seeks accountability for bad actors.

The result of repeated rulings overturning discipline has left those responsible for trying to command

the largest municipal **police** force in Oregon feeling powerless.

"It's frustrating. It's very hard to lead an organization like that," said Brian Martinek, a former Vancouver **police** chief who served as an assistant chief in Portland during the Chasse case and Frashour's shooting of Aaron Campbell.

Once discipline comes down, union leaders frequently get in the command staff's faces, he said, taunting, "We're just going to kick your butt anyways, like we always have."

The Oregonian reviewed 14 Portland **police arbitration** decisions since 1981 and found that discipline usually was overturned because either the bureau did a shoddy investigation or the arbitrator picked apart a chief's decision with a grab bag of objections: Similar misconduct by officers in the past hadn't drawn such discipline; **police** policies were unclear or none governed the alleged misconduct; bureau instructors testified that an officer had acted as trained; or the officer had a prior clean record.

Darrel W. Stephens, executive director of the Major Cities Chiefs **Police** Association, said Portland's experience is not unique.

"Arbitrators find it very difficult to take the **police** officer's livelihood away," said Stephens, who served as chief of the Charlotte-Mecklenburg (N.C.) **Police** Department and teaches at Johns Hopkins University's public safety leadership program.

"The unions may win these things, but they're not helping the organization. The community loses confidence in the **police**, and within the department, it undermines the whole process of discipline."

#### Loss of trust

Portland's **police** union lawyers say the rank and file accept most discipline and the union takes only strong cases to an arbitrator when it's clear an officer was wronged. Further, they say many serious discipline cases don't stand up because they were politically motivated.

"I grant you, it's not the perception of the public," said Will Aitchison, who served as Portland **Police** Association lawyer for 32 years, "but the fact is, it is very rare to find the city's **police** union challenging a **police** termination."

Mark Iris, who served for 21 years as executive director of the Chicago **Police** Board and has written about **arbitration** rulings in Chicago and Houston, said he'd expect serious discipline, which has gone through several layers of review, including grand jury, criminal and internal inquiries, to be upheld

once it got to **arbitration** in at least 75 to 80 percent of cases. But that's not happening nationally. Over time, he said, such reversals can have a "corrosive effect" on an agency's disciplinary process, "erode the deterrent value of discipline" and cause the public to lack confidence in the ability of an agency to control its people.

One need only look at the remarks of the Rev. LeRoy Haynes, chairman of the Albina Ministerial Alliance's Coalition for Justice and **Police** Reform, who helped lead a protest outside City Hall after an arbitrator ordered Frashour back on the force.

"This decision says that those who are elected, that they cannot hold **police** officers in this city accountable," he thundered from City Hall's steps. "It says any **police** officer can do what they want to do. . . . It means we cannot trust our **police** department."

#### Kendra James case

The arbitrator's ruling that dismissed former Chief Mark Kroeker's 900-hour suspension of McCollister reads as a template for how **arbitration** has worn down Portland **police** discipline. The litany of reasons for overturning the suspension have popped up in Portland **arbitration** decisions since. Kroeker had ruled McCollister should not have put himself in such a precarious position by reaching into a moving car to try to stop Kendra James from driving off, only to fatally shoot her in 2003.

Kroeker testified that he recognized the unusually long suspension was "groundbreaking" in the bureau, and said he issued it to "send a message to the officer and to the organization" that McCollister's tactics were faulty and led to the use of deadly force.

"Policing is the kind of profession where the employer must be able to exercise its subjective judgment in making disciplinary decisions; so long as that subjective judgment is exercised in good faith, the arbitrator should not second-guess the disciplinary decisions and sanctions imposed," Kroeker argued.

But the union quickly cited two cases in which officers had reached into moving vehicles without facing such harsh discipline.

One involved a highly respected officer, Mike Stradley, who climbed entirely into a van that was moving to take a suspect into custody and ended up firing his Taser while the van was traveling 80

mph through a city neighborhood. A written reprimand was proposed. The other case involved then-Officer Jim Lawrence, who shot and killed a suspect while reaching into a van that was moving and being dragged. He received no discipline.

The McCollister discipline was further derailed because no internal affairs investigation was done. Instead, the bureau relied solely on the detectives' criminal inquiry, which the union pointed out was contrary to past practice. For a final blow, all the bureau training instructors testified that McCollister had acted as trained, and no policy existed then that restricted an officer from reaching into a moving vehicle.

Sound familiar?

Once McCollister's suspension was reversed, the arbitrator ordered the city to make McCollister whole not only for his back pay, but also include 1.88 hours of overtime for each week he was suspended. The union said the city must compensate him for what he "would have earned."

"The arbitrator can always find an excuse that on its face looks potentially plausible," Iris said. Stephens said arbitrators can't expect agencies to have a policy for every conceivable act of misconduct. "Some of it just has to be about common sense," he said.

Aitchison counters that chiefs can't discipline officers based on a standard of conduct that's not trained. "Cops just want to know what the rules are," he said.

Typically, only the union can decide to challenge an officer's discipline before an arbitrator; officers can't do so on their own. The union's executive board votes and a majority rules. A list of arbitrators is sent to the city and union, and each side alternately strikes names off the list; the last name remaining gets the assignment.

Critics say arbitrators are well aware that if they routinely side with management, the union won't pick them again, or vice versa.

"The last one left standing gets the commission, gets the job," Iris said. "I think arbitrators rein themselves in so they're chosen the next time."

Observers also note that Aitchison, a nationally recognized **police** labor attorney, historically has run circles around city attorneys.

"In many places that's true," Iris said. "The attorney for the union is savvy, experienced and capable, and the city lawyers are vastly overmatched."

To make sure discipline issued by **police** managers is not arbitrary but consistent and

fair, police consultants have recommended agencies adopt what's called a disciplinary matrix. It would set disciplinary guidelines for a variety of violations or misconduct, intended to give officers and police managers a sense of what to expect. A few U.S. police agencies have adopted matrices, including the Los Angeles County Sheriff's Office, Phoenix and the Washington State Patrol.

Portland police are setting up a work group to consider such a matrix.

Beyond that, criminal justice experts have urged police departments to do as much as possible to limit disciplinary problems by setting high standards for hiring with effective screening of applicants, ensuring training is aligned with bureau policy and clear expectations, and there's strong street-level supervision. Also, they emphasized the importance of disciplining officers soon after the alleged mistake.

Upon learning that the Chasse arbitration ruling last week had come 5 1/2 years after Chasse's death, Stephens said: "That's crazy. By the time you get to that point, any impact you intended the discipline to have is long gone."

There's no magic answer, Iris said.

"In some cases," he said, "you basically have to gnash your teeth."

ILLUSTRATION: Campbell Firing of officer who killed him overturned

ILLUSTRATION: Chasse Officers' 80-hour suspensions in his death overturned

ILLUSTRATION: James 900-hour suspension in her death overturned

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